

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

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In the Matter of )

Implementation of the Local Competition )  
Provisions in the Telecommunications Act )  
Of 1996 )

CC Docket No. 96-98

Inter-Carrier Compensation )  
for ISP-Bound Traffic )  
)

CC Docket No. 99-68

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## INTRODUCTION AND SUMMARY

In *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), the Court of Appeals vacated and remanded the Commission's *Reciprocal Compensation Ruling*<sup>1</sup> on two limited grounds. First, in the court's view, the Commission failed to supply "a real explanation for its decision to treat end-to-end analysis as controlling" the question of whether ISP-bound traffic is "local." *Bell Atlantic*, 206 F.3d at 8; *see also id.* at 3. Second, the court found that the Commission had not adequately addressed MCI's argument that ISP-bound traffic constitutes "telephone exchange service." The court did not find that the Commission's legal conclusions were necessarily *wrong*, only that they had not been adequately explained. *See id.* at 8, 9.

On remand, the Commission should reaffirm its conclusion that ISP-bound dial-up traffic is predominantly non-local and interstate, and thus beyond the scope of 47 U.S.C. § 251(b)(5) and the Commission's reciprocal compensation rules. Specifically, the Commission should:

- Reaffirm that traffic delivered to an ISP does not terminate at the ISP, but rather transits the ISP on its way to the servers containing the content the end user is intending to reach;
- Reaffirm that such traffic is not local because it does not *both* originate *and* terminate within the same local area;
- Reaffirm that such traffic is not the type for which section 251(b)(5) reciprocal compensation is intended or legally permissible; and
- Reaffirm that such traffic is predominantly interstate and properly regulated by the Commission itself.

Commission precedent (including a consistent line of cases that the D.C. Circuit never had the opportunity to consider) compels these conclusions, and nothing in the D.C. Circuit's decision prohibits them.

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<sup>1</sup> Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999) (hereinafter "*Reciprocal Compensation Ruling*").

With respect to the first of the court's two holdings, the Commission can and should make clear that it consistently has applied its end-to-end analysis, *not* just in the context of deciding jurisdictional matters, but also to determine substantive service classifications. There is thus ample precedent, including cases never presented to the Court of Appeals, for using this analysis to determine whether particular traffic is "local" and thus subject to reciprocal compensation under section 251(b)(5). Applying such an end-to-end approach to ISP-bound traffic clearly yields the conclusion that such traffic is not "local," and thus that section 251(b)(5) and the Commission's rules implementing it should not apply.

Second, the Commission should clarify that, when it comes to determining the applicability of section 251(b)(5), the whole question of whether ISP-bound traffic is "telephone exchange service," "exchange access," or "information access" is simply just a very red herring. Nothing in section 251(b)(5) or the Commission's rules implementing that section turns on such a classification. The *only* relevant issue in determining whether traffic is subject to section 251(b)(5)'s reciprocal compensation requirement is whether the traffic in question is "local." In any event, if the Commission feels compelled to decide this question, it should find that a LEC's transmission of ISP-bound traffic is a form of information access, a conclusion bolstered by the Court of Appeals' recognition that "access services" include a much broader range of services than does the specific term "exchange access," as defined in the 1996 Act.

The Commission also invited commenters to update the record in the intercarrier compensation rulemaking proceeding. In response to this invitation, Qwest reports that, in the current absence of any uniform federal rule governing this jurisdictionally interstate traffic, the state commissions in Qwest's 14-state territory are continuing to reach different and opposing conclusions regarding the same sets of facts, dividing evenly as to whether or not reciprocal

compensation is due for ISP-bound traffic. The Commission should (and, as Qwest argued in the part of the case not reached by the D.C. Circuit, legally *must*) adopt a uniform rule governing the traffic assigned to its jurisdiction — ideally, one that recognizes that the network costs of which the CLECs are complaining are caused by the particular subset of ISP clients they have chosen to serve (and the subscribers of those clients), not the incumbents.

## ARGUMENT

### **I. RECIPROCAL COMPENSATION IS NOT DUE FOR ISP-BOUND TRAFFIC FOR ONE SIMPLE REASON: THE TRAFFIC IS NOT “LOCAL.”**

In the *Local Competition Order*,<sup>2</sup> the FCC determined that reciprocal compensation under 47 U.S.C. § 251(b)(5) “is intended for a situation in which two carriers collaborate to complete a *local* call.” *Local Competition Order* at 16013 ¶ 1034 (emphasis added). As a result, it concluded that the obligation “should apply only to traffic that originates and terminates *within a local area*.” *Id.* That nearly four-year-old determination is not subject to dispute. Under longstanding Commission precedent, Internet-bound calls to ISPs cannot qualify as “local”; hence, they cannot be subject to reciprocal compensation obligations under section 251(b)(5).

#### **A. There Is Ample Precedent for Using an “End-to-End” Analysis To Determine Whether ISP-Bound Traffic Is “Local.”**

As a preliminary matter, FCC precedent fully supports using an “end-to-end” analysis to determine whether ISP-bound traffic is in fact “local” and subject to section 251(b)(5). Because this issue was not fully briefed before the D.C. Circuit, the Court of Appeals proceeded on the assumption that the Commission has previously examined the end points of a communication

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<sup>2</sup> Report & Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (hereinafter “*Local Competition Order*”).

only when *jurisdiction* was at issue.<sup>3</sup> But the reality is quite to the contrary: the Commission has applied an end-to-end analysis to decide *substantive* issues in quite a large number of cases.

For example, in *Teleconnect Co. v. Bell Tel. Co.*,<sup>6</sup> 6 FCC Rcd 5202 (1991), *recon.*, 10 FCC Rcd 1626 (1995), the Commission used such an analysis to determine the appropriate application of access charges to calls made with Teleconnect's 800 calling card. The Commission looked at the endpoints of these calls to decide whether they consisted of one continuous communication or two separate ones. In determining that there was only one call, the Commission noted that "the end-to-end nature of the communications [is] more significant than the facilities used to complete such communications," and accordingly considered the calling card calls "from [their] inception to [their] completion." 10 FCC Rcd at 1629 ¶ 12. The Commission has repeatedly applied the same end-to-end analysis to determine the appropriate application of access charges to resold 800 services, *see International Telecharge, Inc. v. Southwestern Bell Tel. Co.*, 11 FCC Rcd 10061, 10069-70 ¶¶ 21-22 (1996), and to a variety of optional services including call waiting, call forwarding, voice mail storage, and paging. *See AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, 578-79 ¶ 47 (1998).

The Commission has applied an end-to-end analysis to resolve substantive issues in contexts other than access charges as well. In *Request by RCN Telecom Services and Bell Atlantic for Clarification of Bell Atlantic's Authority to Carry Local Traffic Between Exchanges on Behalf of Competitive Local Exchange Carriers*, 14 FCC Rcd 13861 (1999), RCN Telecom and Bell Atlantic petitioned the Commission for a determination of whether section 271 permits

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<sup>3</sup> Importantly, the D.C. Circuit never questioned the Commission's use of its end-to-end analysis to establish its *jurisdiction* over ISP-bound traffic. As the Court of Appeals recognized, the Commission has "traditionally used" an end-to-end analysis "for jurisdictional purposes to determine whether particular traffic is interstate," *Bell Atlantic*, 206 F.3d at 4, and "has historically been justified in relying on this method" in such a context. *Id.* at 5.

Bell Atlantic to transport RCN's calls between two points within Bell Atlantic's local calling area, even though RCN's point of interconnection is located outside of Bell Atlantic's local calling area. In holding that Bell Atlantic could transport such calls, the Commission again focused on "the end-to-end nature of the communication[]," stating that it could "find no reason for why RCN traffic that *begins and ends* within BA's local calling area cannot pass through an interconnection point outside of the BOC's local calling area." 14 FCC Rcd at 13866 ¶ 13.

The courts as well as the Commission have used an end-to-end analysis to determine substantive questions as well as jurisdictional ones, and they have done so for quite a long time. Since 1918, the Supreme Court has used an end-to-end analysis to determine whether a state commission order unconstitutionally interferes with interstate commerce. In *Western Union Telegraph Co. v. Foster*, 247 U.S. 105 (1918), the Court held that the wire communication at issue "continued . . . until it reached the point where the parties originally intended that the movement should finally end." *Id.* at 113 (internal quotation omitted). Similarly, the district court in *United States v. American Tel. & Tel. Co.*, 57 F. Supp. 451 (S.D.N.Y. 1944), focused on the points of "inception" and "completion" to determine that a call made by a hotel guest, by way of the hotel's PBX, does not "end[] at the PBX board." *Id.* at 454-55.

In light of these precedents, the Commission's use of an end-to-end analysis to determine whether ISP-bound traffic is "local" and therefore subject to reciprocal compensation was entirely justified.

**B. Under This End-To-End Analysis, ISP-Bound Traffic Is Not “Local.”**

**1. The terminating end points of ISP-bound calls are distant web and e-mail servers.**

Applying an end-to-end analysis makes clear, as the Commission previously concluded, that ISP-bound traffic is not local. At the originating end of an Internet call, an ISP subscriber generally dials a seven- or ten-digit number to reach his ISP’s local modem bank. The call is transmitted by the subscriber’s local telephone company to the ISP, where the ISP then connects the subscriber to the ISP’s web server. Through the ISP’s web server, the subscriber can connect with content and addresses on distant servers around the world. It is these web sites and e-mail addresses that constitute the terminating ends of ISP-bound traffic. Because these end points typically are not “local” to the originating end user, the Commission has rightly determined that this traffic is “largely interstate.” *Reciprocal Compensation Ruling*, 14 FCC Rcd 3689 ¶ 1.

The Commission’s treatment of “Feature Group A” service provides solid precedent for this conclusion. Before it became possible to connect to an independent long-distance company directly, subscribers connected to their long-distance carriers’ local POPs by dialing seven-digit local numbers that operated essentially like any other local telephone number. The call was delivered by the LEC to the long-distance company’s switch. After entering a user code, the caller would — at a second dial tone — dial the telephone number of the party he was calling. Even though a caller dialed a “local” number to reach the long-distance company’s switch, and despite delivery of the call to that initial location, the Commission determined that the call to the long-distance company was simply one leg of a single long-distance call. *See Local Competition Order*, 11 FCC Rcd at 15935 n.2091; *Universal Service Report*, 12 FCC Rcd 87, 493 n. 2597 (1996). ISP calls are precisely analogous: After initially connecting to the ISP, the end user

sends a second set of instructions specifying the ultimate destination the end user wants to reach. The dial-up connection is simply the local leg of a single long-distance communication.

**2. Nothing in the Commission's prior definition of "termination" mandates a different conclusion.**

The Commission's prior definition of "termination" in the *Local Competition Order* does not undermine this conclusion. In the *Local Competition Order*, the Commission defined "termination" as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the *called party's* premises." *Local Competition Order*, 11 FCC Rcd at 16015 ¶ 1040 (emphasis added). The D.C. Circuit noted MCI's argument that the ISP could be considered a "called party" in terms of this definition, *Bell Atlantic*, 206 F.3d at 6; however, the court did not rely on this point in reaching its holding, which was based only on the finding that the Commission had not adequately justified using its jurisdictional analysis to decide substantive questions. *Id.* at 8. The court's discussion of who is the "called party" in an Internet-bound call is therefore dicta, and the Commission can (and should) reaffirm its more appropriate analysis of the end point of an Internet call.

As Commission precedent demonstrates, the "called party" in a call is the party with whom the caller ultimately aims to connect. In an ISP-bound call, this typically is a distant web or e-mail server, *not* the local modem bank of the caller's ISP. As the Commission has concluded on several occasions, the fact that a caller first dials a "local" telephone number to reach an intermediate platform before directing his call to its final destination does not render the intermediate platform the "called party." For example, in the 800 service at issue in *Teleconnect*, the end user initiated a call that was "routed through a LEC to an AT&T Megacom 800 line, and

. . . then transferred from AT&T to Teleconnect by another LEC. At that point, Teleconnect generally route[d] the call through the LEC to the end user being called.” *Teleconnect*, 10 FCC Rcd 1627 at ¶ 5. In ruling that Teleconnect’s 800 service “conveys a single communication from the caller to the *called party*,” *id.* at ¶ 14 (emphasis added), the Commission made clear that the “called party” is the ultimately entity with which the caller intends to connect: “The record reflects that the user of the [800] service intends to make a single call terminating not at the Teleconnect intermediate switch, where the Megacom link ends, but at the telephone line of the *called party*.” *Id.* at ¶ 14 (emphasis added). ISP customers surfing the Web ultimately “intend” to reach the content-containing servers of the global Internet, not the modem banks of their ISPs.

Similarly, in the *BellSouth Voice Mail Case*, 7 FCC Rcd 1619 (1992), the Commission rejected the argument that a voice mail subscriber retrieving messages from out-of-state in effect placed two calls — one from the caller to the switch that routes the call to the voice mail service, and another from that switch to the service itself. *Id.* at 1620 ¶ 9. Focusing on the “ultimate destination” of the call, the Commission determined that it constituted a single continuous communication. *Id.* at 1620 ¶¶ 9, 11 (quoting *Southern Pacific Communications Co.*, 61 F.C.C.2d 144 (1976), in which the Commission focused on the “ultimate destination” of a call to determine jurisdiction). Again, the “ultimate destination” of the Internet user is the server containing the desired stored content, not the local modem bank of the ISP.

Moreover, as noted above, the Commission has regarded calls made using Feature Group A service as non-local, despite the fact the caller dials a “local” number to connect to the IXC’s platform before dialing a second number directing the call to the *called party* in a distant exchange. As with Feature Group A service, an end user dialing up the Internet connects first to

an intermediate platform — in this case, the ISP — and then enters additional instructions to direct the communication to its final destination.

The D.C. Circuit’s concern that the *Teleconnect* and *BellSouth* precedents may not apply because ISPs provide “information services” is misplaced. *See Bell Atlantic*, 206 F.3d at 6. The Commission has already determined that this same understanding of where communications begin and end *does* apply to ESP services, of which ISP services are simply a subset. As the Commission has explained, a call to an ESP is an “interstate call[] which *transit[s the ESP’s]* location” on the way to its final destination. *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, 711 ¶ 78 (1983) (emphasis added). Even if an ESP “might terminate a few calls at its own location,” the Commission recognized, most of the calls it receives will “transit its location” and continue on to interstate destinations. *Id.* at 712 ¶ 78.

The D.C. Circuit rather glibly quoted a section of MCI’s brief suggesting that ESPs are no different from many businesses — such as “pizza delivery firms,” “travel reservation agencies,” and “taxicab companies” — that rely on telephone communications to conduct business. *Bell Atlantic*, 206 F.3d at 7. The difference is that the calls that ISPs receive are not simply incidental to the services they provide; rather, they are an integral part of the very product that the ISP is providing. In providing their subscribers with “information service,” these ISPs are, by definition, providing them with service “via telecommunications.” 47 U.S.C. § 153(20). What goes into the ISP is telecommunications, and what leaves it and continues to the destination server — *i.e.*, the “service” offered to the consumer — is telecommunications as well, bundled with the routing and protocol conversion required to carry the telecommunications transmission over the Internet. By definition, the “telecommunications” continue on, even

though combined with information processing.<sup>4</sup> By contrast, even if the types of businesses cited by the court use telecommunications to receive or respond to their customers' requests, the end products that they sell — pizza, airline tickets, or cab rides — have nothing to do with telecommunications. The phone calls received by a pizza parlor do not go on top of the pie. To the extent the court was citing these other businesses because the customer's initial call may trigger other communications by the business (for example, to dispatch a taxi in response to a customer's request), the examples are distinguishable because the customer in these cases does not dial, direct, or participate in these subsequent communications; a person calling Domino's for a pizza does actually get on the radio to dispatch the driver after calling in her order.<sup>5</sup>

**3.     The ESP exemption supports the conclusion that ISP-bound traffic is not "local."**

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Contrary to the D.C. Circuit's view, *see Bell Atlantic*, 206 F.3d at 6, the "ESP exemption" does not undermine the above analysis. Indeed, the fact that the Commission created an *exemption* from the access charge regime for ESPs is straightforward evidence that, without it, the access charge regime — imposed only on *non*-local traffic — would in fact apply. Since it created the exemption in 1983, the Commission consistently has regarded the services that ESPs purchase from LECs as "access" services. *See MTS and WATS Market Structure*, 97 F.C.C.2d 682, 711 ¶ 78 (describing "enhanced service providers" as "users of access service"); *Part 69 of*

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<sup>4</sup> The continuity of this underlying link justifies treating the entire communication between surfer and server as a unitary "call," just as the continuity of the stream of television signals justified treating telephone companies' "channel services" for community antenna television systems as a jurisdictionally interstate extension of broadcasting, despite the change in medium from airwave to wire. *See General Tel. Co. v. FCC*, 413 F.2d 390, 401 (D.C. Cir. 1969).

<sup>5</sup> The court's additional mention of credit card verification firms, *Bell Atlantic*, 206 F.3d at 7, is puzzling; if these firms are actually providing an interstate information service, then calls to those firms should be treated as interstate access calls, just like calls to ISPs should be.

*the Commission's Rules Relating to the Creation of Access Charge Subelements of Open Network Architecture*, 6 FCC Rcd 4524, 4535 ¶ 61 (“ESPs generally take lineside access”); *Access Charge Reform Order*, 12 FCC Rcd 15982, 16131 ¶ 314 (ISPs “may use incumbent LEC facilities to originate and terminate interstate calls”).

The Court of Appeals expressed concern that, in a footnote in the *Access Charge Reform Order*, the Commission referred to the call placed by an ISP subscriber to his ISP as a “local call.” *Bell Atlantic*, 206 F.3d at 8 (citing *Access Charge Reform Order* at ¶ 342 n.502). But the court was presented with this term out of context: in its entirety, that footnote states, “[t]o maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.” *Access Charge Reform Order* ¶ 342 n.502. Rather than being a conclusion about the nature of the services that a LEC provides to an ISP, this statement merely recognizes that ISPs place POPs near subscribers so that the subscribers can reach them by dialing a local number. As discussed above, the Commission has held in the context of Feature Group A service that the fact that a customer dials a local number to connect to the intermediate platform from which his call will then continue to its ultimate, distant destination does not make the call “local.” To the extent that this footnote may appear to conflict with the Commission’s other precedents, the Commission has the discretion to reconcile them, and it should reaffirm its longstanding conclusion that ESps are users of access.

**C. Whether ISP Dial-Up Is Classified As “Telephone Exchange Service,” “Exchange Access,” or “Information Access” Is Irrelevant.**

The D.C. Circuit stated that “an independent ground requiring remand” was the Commission’s failure to adequately respond to MCI’s argument that ISP-bound traffic constitutes “telephone exchange service.” *Bell Atlantic*, 206 F.3d at 8. But, notwithstanding

MCI's best efforts to confound the issues on appeal, the *only* factor on which the applicability of reciprocal compensation turns is whether the traffic in question is "local." *See Reciprocal Compensation Ruling* at 3706 n.87. Nothing in the Act, or in the FCC's implementation of it, suggests that the applicability of the reciprocal compensation obligation turns on whether a particular service might be classified as "telephone exchange service," "exchange access," or any other type of access service (such as "information access"). *See* 47 U.S.C. § 251(b)(5); 47 C.F.R. §§ 51.701 to 51.717; *Local Competition Order* at 16012-13 ¶¶ 1033-34. The Commission should make this clear.

Neither section 251(b)(5), nor the parts of the *Local Interconnection Order* implementing that statute, mentions any of these terms. In contrast with other parts of the Act and the Commission's *Local Competition Order*, *see, e.g.*, 47 U.S.C. § 251(c)(2); *Local Competition Order* ¶¶ 181-192, the provisions implementing reciprocal compensation simply do not include any reference to these words. That these terms are *not* used in defining the reciprocal compensation obligation is strong evidence that they simply do not apply.

If the Commission nevertheless believes that it must put ISP dial-up in one of the statutory boxes, it should rule that the telecommunications service that local exchange carriers provide to ISPs is *neither* "telephone exchange service" nor "exchange access." The LEC portion of an ISP-bound call does not constitute "telephone exchange service" because such calls do not remain "within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area." 47 U.S.C. § 153(47)(A). Rather, as described above, ISP-bound calls typically travel to web and e-mail servers around the world. And because ISPs do not provide "telephone toll services" to their subscribers, *see* 47 U.S.C. § 153(16), the LEC portion of these calls does not qualify as "exchange access."

Instead, the carriage of dial-up traffic to an ISP for connection to the Internet is best classified as a form of “information access.” As the Court of Appeals recognized, “access services” are generically defined as “services and facilities provided for the origination or termination of any interstate or foreign telecommunication,” and comprise a broader category of services than the 1996 Act term “exchange access.” *Bell Atlantic*, 206 F.3d at 8 (quoting 47 C.F.R. § 69.2(b)). The other kind of “access service” is “information access,” which has been defined since before the Act as service provided “in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services.” *United States v. American Tel. & Tel. Co.*, 552, F Supp. 131, 229 (D.D.C. 1982) (emphasis added). This definition describes ISP dial-up far more accurately than either of the alternatives do.

**II. NOW THAT THE COMMISSION HAS CORRECTLY DETERMINED THAT ISP-BOUND TRAFFIC IS NON-LOCAL AND JURISDICTIONALLY INTERSTATE, IT SHOULD IMPOSE UNIFORM NATIONAL RULES TO GOVERN THIS TRAFFIC.**

The Commission’s Public Notice asked commenters to update the record in the pending rulemaking docket exploring whether the Commission should adopt a uniform national rule governing intercarrier compensation for ISP dial-up calls. Since the original comments, states in Qwest’s region have continued to diverge on the regulation of this traffic, reaching opposite conclusions on precisely the same facts. This dissensus is not surprising, given the absence of any guidance from Commission with respect to these matters legally assigned to its jurisdiction. It is time for the Commission to put an end to this confusion by adopting uniform national rules for this traffic, based on its correct determination that ISP-bound traffic is “largely interstate.” *Reciprocal Compensation Ruling* at 3689 ¶ 1.

Since the Court of Appeals issued its decision, four public utility commissions in Qwest's 14-state territory have arbitrated interconnection agreements to determine whether reciprocal compensation is due for ISP-bound traffic. Their decisions have been all over the map.

Two states have declined to provide reciprocal compensation for ISP-bound traffic. The Arizona Corporation Commission acknowledged the fundamental irrationality and unfairness of forcing incumbent LEC customers to subsidize the telecommunications costs of ISPs, which are more appropriately borne by their own customers. *Petition of Sprint Communications Co., L.P., for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with U S WEST Communications, Inc.*, Dkt. Nos. T-02432B-00-0026, T-01051B-00-0026 (Arizona Corp. Comm'n June 13, 2000). After summarizing the parties' positions and the FCC's *Reciprocal Compensation Ruling*, the Arizona commission held:

We share U S WEST's concern that establishing reciprocal compensation for ISP bound traffic would result in ratepayers subsidizing the Internet. Further, this Commission recognizes that ISP bound traffic increases the need for additional infrastructure to accommodate increased network traffic. Thus, it is inappropriate for this Commission to order U S WEST to construct facilities to handle additional traffic and pay for the privilege of doing such. Therefore, we believe that bill and keep is the appropriate compensation method for ISP bound traffic.

*Id.* at 7.

The Colorado PUC has reached the same result. *See Petition of Sprint Communications Co., L.P., for Arbitration Pursuant to U.S. Code 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.*, Initial Commission Decision, Dkt. No. 00B-011T (Colo. Pub. Utils. Comm'n May 3, 2000)

(hereinafter, “*Colorado Decision*”).<sup>6</sup> In a particularly well-reasoned decision, the Colorado PUC noted that both the incumbent LEC and CLEC provide “access-like functions” in carrying calls between ISP subscribers and their ISPs, for which payment of compensation is not appropriate. *Id.* at 14-15. But even if this traffic *were* clearly local, the PUC held, the equities weigh so strongly in favor of the incumbent LECs that the PUC “*still* would not embrace reciprocal compensation with a positive rate”:

Such a scheme would, in our view, bestow upon Sprint an unwarranted property right, the exercise of which would result in decidedly one-sided compensation. In addition, we find that reciprocal compensation would introduce a series of unwanted distortions into the market. These include: (1) cross-subsidization of CLECs, ISPs, and Internet users by the ILEC’s customers who do not use the Internet; (2) excessive use of the Internet; (3) excessive entry into the market by CLECs specializing in ISP traffic mainly for the purpose of receiving compensation from the ILECs; and (4) disincentives for CLECs to offer either residential service or advanced services themselves. In short, we agree with U S WEST that *reciprocal compensation for ISP traffic would not improve social welfare; it would simply improve the welfare of some at the expense of others.*

*Id.* at 16-17 (emphasis added). As a result, the Colorado commission concluded that “bill and keep should be adopted here to deal with ISP traffic.” *Id.* at 17-18.<sup>7</sup>

On the other hand, two state commissions *have* required reciprocal compensation for ISP-bound traffic. In arbitrating an interconnection agreement between Sprint and U S WEST, the

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<sup>6</sup> See also *Petition of Sprint Communications Co., L.P., for Arbitration Pursuant to U.S. Code 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.*, Decision Denying Application for Rehearing, Dkt. No. 00B-011T (Colo. Pub. Utils. Comm’n June 7, 2000).

<sup>7</sup> The Colorado PUC acknowledged that it had previously ordered U S WEST to pay ICG reciprocal compensation for ISP-bound traffic in an earlier arbitration; however, the interconnection agreement in the prior case had “provided for termination compensation for ISP traffic.” *Colorado Decision* at 10. Moreover, “the economic analysis present in this record [in the *Sprint* case] was not present in the [prior] proceeding.” *Id.* at 11.

Minnesota PUC noted that “the FCC has made clear that state commissions could [order the payment of reciprocal compensation for ISP-bound traffic] based solely on the FCC’s policy of treating ISP-bound traffic as local for purposes of interstate access charges.” *See Petition of Sprint Communications Co. L.P. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b)*, Dkt. No. P-466,421/M-00-33 (Minn. Pub. Utils. Comm’n June 27, 2000) at 5 (citing *Reciprocal Compensation Ruling* at ¶ 25).<sup>8</sup> The Minnesota PUC also held that, in the absence of reciprocal compensation, the “[d]elivering [c]arrier” would receive no compensation for the costs of “local transport and end-office termination services,” *id.* at 5 — an odd holding, given that the proper source of such compensation (the CLEC customer now receiving heavily subsidized service) seems obvious.<sup>9</sup>

The Washington Utilities and Transportation Commission has required reciprocal compensation for ISP-bound traffic as well. *See Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Co. L.P. and U S WEST Communications, Inc., Pursuant to 47 U.S.C. Section 252*, Dkt. No. UT-003006 (Wash. Utils. And Transp. Comm’n July 2000). In its view, because the FCC exempted ISP-bound traffic from the access charge regime, reciprocal compensation must apply. *Id.* at 10-11 (internal quotation omitted).

As Qwest and the other ILECs argued in the appeal of the *Reciprocal Compensation Declaratory Ruling*, once the Commission determines that ISP-bound dial-up traffic is

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<sup>8</sup> The Commission said no such thing. Rather, in the paragraph cited by the state commission for this proposition, the FCC said merely that its ESP exemption “would, if applied in the separate context of reciprocal compensation, *suggest* that such compensation is due for that traffic.” *Reciprocal Compensation Ruling* at ¶ 25 (emphasis added).

<sup>9</sup> Moreover, the Minnesota PUC did not explain how, in the face of the FCC’s *Reciprocal Compensation Declaratory Ruling*, the delivering carrier can be said to “terminate” calls; nor does the state commission provide an alternate definition of “termination” that might apply.

jurisdictionally interstate, and thus outside the scope of section 251(b)(5), there is no legal basis for abdicating jurisdiction or authorizing the states to do what federal law forbids. The persisting mess in the states demonstrates the folly of continuing to duck the issue. The Commission should make clear as it goes forward what compensation rule will apply to this interstate traffic.

In particular, the Commission should follow Colorado's lead and adopt a compensation rule consistent with economically efficient principles of cost causation. The dial-up callers who are supposedly causing the CLECs to incur huge "termination" costs are not simply fortuitous customers of the incumbent LEC; rather, they are the subscriber base of the very ISP customers whom the CLECs have chosen to serve exclusively. *See Colorado Decision* at 14 ("We view the originator of the Internet-bound call as acting primarily as a customer of the ISP, not as a customer of U S WEST."). The network costs that CLECs incur in serving their ISPs (or that ISPs cause in providing service to their subscribers) are most appropriately and efficiently borne within the contractual relationship between ISPs and their subscribers, not subsidized by the general incumbent ratebase. As economist Bill Taylor of National Economic Research Associates explained in an *ex parte* to the Commission, the most appropriate way to view a person making an ISP dial-up call is

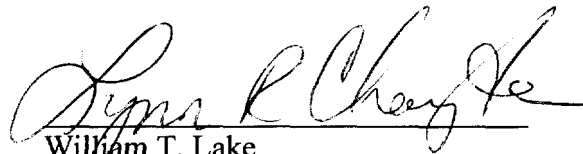
as an [ISP] customer placing an Internet-bound call, not a U S WEST customer placing a local call. Although the portion of her Internet call that lies entirely within the circuit-switched network . . . *resembles* a local call, its economic function is very different, since [the ISP] is not simply a passive end-user recipient of her call. Rather, [the ISP] designs, markets, and sells [the caller] the service, collects her monthly fee for Internet access, answers her questions, establishes telephone numbers at which she can access its services without paying toll charges, and pays the CLEC for access to the public switched telephone network. Moreover, [the ISP] performs standard carrier functions such as transport and routing, as well as maintains leased facilities within the backbone network. U S WEST and the CLEC simply provide access-like functions to help the Internet call on its way.

William E. Taylor, et al., *An Economic and Policy Analysis of Efficient Inter-carrier Compensation Mechanisms for ISP-Bound Traffic* at 5 ¶ 12 (Nov. 12, 1999) (emphasis in original). As a result, “under an economically efficient system of compensation, the ILEC would not be required to pay reciprocal compensation to a CLEC for Internet calls made by the ILEC’s subscribers.” *Id.* at 6 ¶ 15.

### CONCLUSION

For the reasons set out above, the Commission should reaffirm its conclusion that ISP-bound traffic is not “local” and therefore is not subject to the reciprocal compensation obligation under section 251(b)(5).

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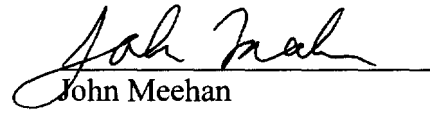
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I, John Meehan, do hereby certify that on this 21st day of July, 2000, the foregoing Comments of Qwest Corporation have been served by hand, where indicated by asterisk, or by first class mail, postage prepaid, upon the parties on the attached service list.

  
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